Public Prosecutor v Roslan bin Kachi Mydin

HIGH COURT (PULAU PINANG) — CRIMINAL TRIAL NO 45–4 OF 2000
KAMALANATHAN RATNAM J
21 JANUARY 2004

Criminal Law — Dangerous Drugs Act (Malaysia) — ss 6, 37(da)(vi),(vii) — Evidence of chemist — Whether proper procedure followed in analyzing drugs — Whether presumption of trafficking arose — Whether charge to be amended

The accused was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 'the Act' for trafficking drugs which carried the death sentence under s 39B(2) of the Act. The offence was allegedly to have been committed on 1 May 1999 in the vicinity of the parking space in Bangunan MPSP, Pulau Pinang. The burden of proof was upon the prosecution to establish that the accused had in possession 200g of cannabis or more for the charge to prevail. During the trial, the chemist testified that in both her findings and analysis, the result was proven to be cannabis resin. The issues before the court were: (i) whether the charge was correctly imposed; (ii) whether the cannabis had been accurately analyzed by the chemist; and (iii) whether the presumption of trafficking cannabis had arose.

Held, amending the charge:

The charge ought to be reduced from s 39B(1)(a) to s 6 of the Act based on the chemist's evidence as she did not analyze the actual amount of 35.1g of the sample given to her. The chemist had taken 32 samples weighing 35.1g when she ought to have taken a total weight of 200g to assess whether it was cannabis or cannabis resin for the presumption of trafficking to stand (see para 3); *PP v Mohammad b Ambunani* [1994] 4 CLJ 871 and *PP v Poh Ah Kwang* [2003] 2CLJ 722 followed.

[Bahasa Malaysia summary

Tertuduh telah dituduh dengan kesalahan di bawah s 39B(1)(a) Akta Dadah Merbahaya 1952 ('Akta tersebut') kerana mengedar dadah yang membawa hukuman mati di bawah s 39B(2) Akta tersebut. Kesalahan yang dipertuduhkan telah dikatakan dilakukan pada 1 Mei 1999 di kawasan tempat letak kereta Bangunan MPSP, Pulau Pinang. Beban pembuktian adalah terletak di atas pihak pendakwa bagi membuktikan bahawa tertuduh mempunyai milikan terhadap 200g 'cannabis' atau lebih supaya tuduhan dapat dikekalkan. Semasa perbicaraan, ahli kimia memberi keterangan bahawa hasil daripada analisis, beliau mendapati bahawa ia adalah 'cannabis'. Persoalan-persoalan yang perlu ditentukan oleh mahkamah adalah: (i) sama ada pertuduhan yang dipertuduhkan adalah benar; (ii) sama ada analisis ahli kimia adalah tepat; dan (iii) sama ada anggapan mengedar 'cannabis' telah berbangkit.

Diputuskan, meminda pertuduhan tersebut:

Pertuduhan hendaklah dipinda daripada s 39B(1)(a) kepada s 6 Akta tersebut berdasarkan kepada keterangan yang diberikan oleh ahli kimia kerana beliau

gagal menganalisa jumlah sebenar iaitu 35.1g 'cannabis'. Ahli kimia telah mengambil 32 sampel seberat 32.1g bilamana beliau sepatutnya mengambil 200g dalam menguji sama ada ia adalah cannabis atau resin cannabis untuk andaian mengedar terpakai (lihat perenggan 3); *PP v Mohammad b Ambunani* [1994] 4 CLJ 871 dan *PP v Poh Ah Kwang* [2003] 2 CLJ 722 diikut.]

Notes

For cases on Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 142–143.

Cases referred to

PP v Mohammad bin Ambunani [1994] 4 CLJ 871 (folld)
PP v Poh Ah Kwang [2003] 2 CLJ 722 (folld)

Legislaton referred to

Dangerous Drugs Act 1952 ss 6, 37(da)(vi), (vii).

Hazril bin Harun (Attorney-General's Chambers) for the prosecution.
Jagdeep Singh Deo (Simon Murali with him) (Karpal Singh & Co) for the respondent.

Kamalanathan Ratnam J:

THE CHARGE

[1] The charge against the accused read as follows:

> Bahawa kamu pada 1 Mei 1999, jam lebih kurang 11.20 malam di kawasan semak berhampiran padang letak kereta Bangunan MPSP, Butterworth, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu 914 gram cannabis, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (semakan 1980) dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

FINDINGS OF THE COURT

Reduction of charge based on chemist's evidence

[2] The prosecution called a total of seven witnesses. To maintain this charge, the prosecution had to show that the accused was found in possession of 200g or more in weight of cannabis (s 37(da)(vi) of the Dangerous Drugs Act 1952 ('the Act')). However, the chemist testified that what she was given and what she analyzed was cannabis resin. The presumption arising against trafficking in cannabis resin is governed by s 37(da)(vii) of the Act. The prosecution ought to have amended the charge accordingly and ought to have adduced evidence to explain to the court the difference between cannabis and cannabis resin.

[3] In this case, even if the prosecution had amended the charge, or for that matter, even if this court had amended the charge, I would have held such an amendment as futile because the chemist testified that she took 32 samples weighing 35.1g when she ought to have taken a total weight of 200g whether of cannabis or of cannabis resin for the presumption of trafficking to stand.

[4] Another important factor that this court ought to consider is that out of the total of 35.1g of sample, the chemist did not even weigh the actual amount she took to analyze since she agreed that she did not analyze the total 35.1g. In the circumstances, giving the accused the benefit of the doubt, the lowest punishable section the accused could be charged with is under s6 of the Act. It is permissible for this court to reduce the charge based on the chemist's evidence (see *PP v Mohammad b Ambunani* [1994] 4 CLJ 871 and my own decision in *PP v Poh Ah Kwang* [2003] 2 CLJ 722) .

[5] I then called for the defence on the amended charge of s 6 of the Act. When the amended charge was read and the three alternatives explained, the accused pleaded guilty to the said amended charge.

[6] In mitigation, counsel for the accused pointed out that the accused had been on remand since the date of arrest. The maximum sentence under this section is a fine not exceeding RM20,000 or to imprisonment for a term not exceeding five years or to both. Counsel urged the court for a light sentence since the accused is a bachelor lived with his mother who was dependent on him, prior to his arrest. The learned deputy public prosecutor urged me to consider public interest and asked me to impose the maximum fine and imprisonment.

[7] Having considered the gravity of the original charge and considering the fact that offences relating to this Act are so rampant and prevalent, Isentenced the accused to the maximum five years in prison and fined him the maximum RM20,000, which in default 15 months imprisonment. The sentence was to run from the date of his arrest. The learned deputy has appealed against this decision.

Charged amended.

Reported by Haryati Yusoff